JD–124–97
Millville, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE MORIE COMPANY, INC.

and

Cases 4–CA–24574-1,
4–CA–24574-2,
and 4–CA–24923

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 8-398

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DECISION

Statement of the Case

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Millville, New Jersey, on November 12-16, 1996. Subsequent to an extension in the filing date, briefs were filed by all parties. The proceeding is based upon charges filed January 24 and May 15, 1996.[1] by Oil, Chemical and Atomic Workers International Union and its Local 8-398. The Regional Director's complaint dated November 5, 1996, as amended, alleges that Respondent, The Morie Company, Inc., of Millville, New Jersey, violated Section 8(a)(1) and (3) of the National Labor Relations Act by promising employees benefits if they abandoned the Unions; declaring that employees were not being recalled to work because of their Union activities; and failing to recall or delaying the recall of twenty-seven striking workers.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged in the mining, processing and sale of sand and gravel. It annually ships goods valued in excess of $50,000 from its New Jersey locations to points outside New Jersey and it admits that at all times material is and has been an employer

[1] All following dates will be in 1996 unless otherwise indicated.

engaged in operations affecting commerce within the meaning of Sections 2(2)(6) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

Respondent operates five production facilities in Southeastern New Jersey, all located within 25 miles of its Millville headquarters, and also has plants in Tennessee, Alabama and Georgia.

Respondent's Mauricetown plant produces sand and gravel which is sold in both bulk and packaged form. For most of its 60 year history, the facility included sand mining and sand and gravel processing operations, however, sand reserves were depleted, mining ceased in December 1994, and the facility now processes sand and gravel trucked in from nearby mines of either Respondent or other companies.

Mauricetown is the only New Jersey facility which employs Union represented workers and the Unions have represented production and maintenance employees at the Mauricetown facility since about 1971. The bargaining unit includes workers classified as maintenance, truckdrivers, storekeepers, dozer operators, yard laborers, heavy equipment operators, drier operators, bulkloaders and Inglett operators. The duties performed by most employees are indicated by the titles of their classifications. Drier operators run machines used to dry sand and gravel. Bulkloaders move the dried sand to either stockpiles, a bulkloading operation or an area where it is bagged for sale. The Inglett operators work in the bagging area. Demand for some of the items produced at the Mauricetown plant is seasonal, and the facility is busiest during the spring and summer months.

Kenneth Giaccio has been the plant manager since about 1991. Other on-site managers include assistant plant manager Nick Carpelli, plant administrator John Armstrong and production supervisors Wayne Humphrey, Ralph Campbell, Bob Fullerton and James D'Ambrosio, Jr. Arthur Wilson is the International Union representative assigned to represent the Mauricetown employees and on-site representation is provided by a chief and assistant shop steward. Don Corbin and Luis Lopez currently hold these positions. When Giaccio arrived at the plant in 1991, employee William Wolf was chief shop steward and Corbin was his assistant.

In late 1992 or early 1993, the Company instituted a productivity improvement program which required employees to take greater responsibility for plant operations. At that time steward Wolf indicated his opposition to the program in several conversations with plant manager Giaccio.

In June 1993, the Unions and the Company signed a new collective bargaining agreement after the Company unsuccessfully sought to codify its productivity improvement program in the negotiations leading to this agreement. Wolf was terminated either shortly before or just after the negotiations began, however, a grievance over the termination was eventually arbitrated, and in February, 1994, the Company was ordered to reinstate Wolf with backpay. Several month after William Wolf returned to work, production supervisor Fullerton accused him being a "thorn in the Company's side" and stated that Wolf "didn't belong here" and would not be employed by the Company if it were not for the Union.

The 1993 contract was replaced by a new agreement effective from June 25, 1994, through May 2, 1997. The agreement did not provide for any increase in employee pay rates

but gave the Unions the right to reopen the contract in September 1995 for the purpose of negotiating wages. Such negotiations, if requested, were to be concluded by January 19, 1996, with the Unions having the right to strike in support of their wage proposals "commencing at 12:01 a.m. on January 20."

The Union represented 49 employees at the Mauricetown plant at the peak of the 1994 busy season of which 6 worked in the plant's sand mining operation and before 1994, the Company had not used truckdrivers to transport sand or gravel to the plant for processing. Anticipating that the work available for unit employees would decrease when sand mining ceased, the Company agreed in October 1994 to create three new truckdriver positions and to use its driver to transport sand from other facilities to Mauricetown.

The 1995 and 1996 payroll records for the Mauricetown plant show that number of unit employees employed at the plant including 7 Inglett operators. The number of employees dropped to 37 on March 21, but then increased to 45 on May 17, at which time 12 Inglett operators were listed. On June 22, the number dropped to 44 and held steady at this figure until late July when two workers were laid off and a third was transferred, leaving 41 employees. In early August, the Company reduced its complement of Inglett operators from 12 to 10.

Additional layoffs in early November reduced the number of employees to 32 and reached a low of 31 on January 1, 1996, when maintenance worker Dennis Welden left on disability. At that juncture, the Company employed eight Inglett operators and six truckdrivers. On January 8, four employees were recalled from lay off increasing the size of the Company's workforce from 31 to 35, but the number of unit employees was again reduced to 34 on January 11 when truckdriver Angel Bermudez went out on disability. As of January 20, the Mauricetown workforce included 8 Inglett operators, 6 maintenance workers, 5 truckdrivers, 4 bulkloaders, 3 drier operators, 3 yard laborers, 3 heavy equipment operators, a dozer operator and a storekeeper. The plant seniority list prepared on January 15, shows 35 active employees, 4 employees on layoff and Welden out on disability.

In accordance with the contract, the Unions requested wage reopener negotiations and bargaining sessions were held in Millville on January 16 and 19. The Unions were represented by International Representative Wilson, shop stewards Corbin and Lopez and truckdriver Joseph Wolf. Plant manager Giaccio, attorney Frederick Rohloff and production supervisor Campbell represented the Company. The second of the sessions concluded at 4:00 p.m. on January 19 with the Company making a "final offer." The three employees on the Unions' committee were unhappy with the offer, and Wilson had each of the employees express his frustrations as the meeting concluded. Joseph Wolf the last of the three to speak, was described by Wilson as quite upset and he said Wolf included some profanity in his denouncement of the Company offer. Giaccio responded by announcing that he was "not going to listen to this", got up and left the room.

That evening, the bargaining unit voted unanimously to reject the Company's final offer and to strike. The strike began at 12:01 a.m., Saturday, January 20. All employees working at the plant on January 19 joined the strike and no one crossed the picket line. The four laid off employees and disabled maintenance worker Dennis Welden did not become involved.

Plant manager Giaccio testified that the plant was not originally scheduled to operate over the weekend, but, in an effort to satisfy customer orders, Giaccio had supervisors operate portions of the facility on both Saturday and Sunday. On Monday, January 22, he made arrangements for employees from other Company plants to come and work in Mauricetown.

Among the employees who worked were lab technicians/safety coordinator Jody Farabella and William Porter, an individual who had been laid off by the Respondent from the Port Elizabeth plant in November, 1995.

The Company and the Unions had further contact after the work stoppage began when Giaccio and Wilson spoke by telephone Saturday morning and afternoon and Wilson said that the first conversations focused on the reasons for the employees' rejection of the Company offer and ended with Wilson promising to canvas employees in an effort to determine what changes in the offer might induce them to accept it. In an afternoon conversation, Wilson indicated employees were interested in having the Company's offer made retroactive, and Giaccio promised to explore the matter. Wilson denied Giaccio made any mention of replacement workers in either of their January 20 conversations.[2]

On Monday morning a Federal mediator suggested Wilson contact Rohloff, and the two men spoke by telephone at about 2 p.m. Wilson told Rohloff he intended to have another meeting with employees and asked if the Company could sweeten its offer to improve the chances for acceptance. Rohloff said he would check with his client and mentioning that Giaccio had informed Wilson on Saturday of the Company's intention to replace the strikers by the end of the week. Wilson denied being informed of the Company's intentions, and the conversation ended with an argument over whether Wilson had or had not been informed of the Company plans.

At about 2 p.m. on Monday, Giaccio began to contact potential replacement workers by telephone and he spent approximately six of the next nine hours making calls and speaking with numerous candidates for employment. Assistant plant manager Carpelli assertedly was present during much of this time which included some phone contacts with the references offered by some of the applicants. Giaccio found 12 persons who indicated an interest in employment and told them to report to the Company's Millville headquarters at 8 a.m. on the following day. Giaccio said he would have been required to hire 23 additional replacements in order to reach a full pre-strike complement of 35 or 36 employees.

Meanwhile, at about 4 p.m. on January 22, Wilson visited the picket line, told shop stewards Corbin and Lopez that Respondent was threatening to replace the strikers and asked the stewards to arrange a meeting with unit employees for 8 a.m. on the following morning. On the evening of January 22, Wilson again spoke by telephone with Rohloff in an unsuccessful effort to secure a modification of the Company offer.

Wilson met and spoke with employees outside the plant shortly before 8 a.m. on the morning of January 23 and they were persuaded to accept the Company's January 19 offer. Shortly thereafter, Wilson entered the plant and handed Giaccio a letter he had prepared which stated that unit employees had "voted to accept the Company's last, best and final wage offer" and were "unilaterally" offering to return to work immediately". Giaccio said he would contact Rohloff and "get right back." Wilson left the plant and returned to the picket line arriving at 8:30 a.m.

[2] Giaccio testified that he ended the morning conversation by promising to speak with his superiors about improving the Company's offer and began the afternoon discussion by stating that no improvement would be forthcoming. Giaccio also insisted he told Wilson on the afternoon of January 20 that the Company intended to replace the strikers by the end of the following week.

As events were unfolding at the Mauricetown plant, strike replacements were arriving at the Company's Millville office and 11 or the 12 potential replacements who Giaccio spoke with the previous evening arrived at the Millville office at approximately 8 a.m. Safety Manager Atkinson had them wait in a conference room while he gathered the forms used in processing new hires and forms were distributed between 8:30 a.m. and 8:45 a.m. It took the replacements about 90 minutes to complete them after which they were sent off for drug testing and the replacements ultimately arrive at the Mauricetown facility to start work until about noon. Replacement, Brian LaBonne, did not arrive at the Millville office for processing until about 10:45 a.m. and did not start work until about 10:00 p.m. on the evening of January 23.

Union representative Wilson remained on the picket line until approximately 10 a.m. on January 23 waiting for word from plant manager Giaccio regarding the strikers' offer to return to work. When nothing was forthcoming, Wilson changed the picket signs to indicate that employees had been locked out.

When Wilson reached his home/office he discovered a letter from Rohloff which had been sent by facsimile transmission earlier in the day. This letter acknowledging the Unions' acceptance of the outstanding Company proposal and the accompanying offer for the strikers to return to work, but noted that 13 employees had been hired as permanent replacements for strikers and suggested Wilson contact Giaccio to schedule a meeting at which the parties could discuss "the orderly resumption of full operations including establishing a schedule for the return to work of striking employees. . . to jobs not filled by the permanent replacements." Wilson responded by immediately sending Giaccio a letter by facsimile transmission in which he confirmed the Unions' willingness to meet to discuss "the orderly return of the locked out employees".

The parties met on Thursday, January 25 Rohloff reaffirmed that 13 replacements had been hired and announced that only 9 strikers would be recalled to begin work on the following Monday, January 29. A list of the nine was produced and handed to Wilson. When his demand for the termination of the replacements was denied, he asked that one of the shop stewards be returned to work, and the Company agreed to add assistant steward Luis Lopez to the list of recalled strikers. Following the meeting, the Unions' pickets were removed.

A total of 23 employees in unit positions were employed after the initial group of ten strikers returned to work on January 29. Included in this group were seven Inglett operators, five maintenance employees, four bulkloaders, three drier operators, three heavy equipment operators and one storekeeper.

Giaccio admitted that non-unit office workers and supervisors continued to perform unit work for two to three weeks following the conclusion of the strike and the number of unit employees did increase as the non-unit workers departed. The pre-strike level of 34 unit employees was not reached until April 1, at the start of the plant's busy season when the employee complement was normally much higher (At a similar point in 1995, the plant employed 44 unit employees), and the 1996 workforce remained 8 or 9 employees below 1995 levels through most of the spring and summer months.

Company records show that plant sales in the first 9 months of 1995 and 1996 were generally comparable. Similarly, a Company chart shows that the number of bags of sand shipped by the plant in the period from February through May 1996 approximated the number of bags shipped during the same period in 1995 and shows that following the strike, the Company was able to maintain or increase production levels despite a reduction in the number of unit employees. Payroll records showing the number of hours worked by unit employees in

1995 and the first 10 months of 1996, demonstrate that the number of overtime hours worked by unit employees in the months following the strike was roughly five times greater than the number of overtime hours worked during the 13 months preceding the work stoppage.

Work schedules for March, April, May and June 1996 show that employees in the Inglett operator and bulkloader classifications were regularly scheduled to work 12-hour shifts starting in April 1996 and this allowed the Company to significantly increase hours worked without increasing the number of employees in the classifications.

The testimony of strike replacement Allen Lorenzo shows that plant manager Giaccio met with the replacements in the Mauricetown plant maintenance shop on January 25 or 26 and told them that the strikers would probably not get their jobs back, and that he hoped the replacements would be permanent. He also urged the replacements to work together and accused the strikers of failing to do this and also said something to the effect that he did not want the strikers back and was going to do everything he could to avoid their return. Giaccio did not dispute the latter statement.

The replacement employees were assigned to work as Inglett operators, bulkloaders and drier operators and displaced a number of strikers who had occupied those positions. The displaced strikers included drier operator Daniel Colon and bulkloader William Wolf. Under the collective bargaining agreement between Respondent and the Unions, employees are laid off according to seniority and recalled in reverse order of layoff. An employee can be recalled to a classification different from the classification in which he was laid off. The lowest paid classification is yard laborer, a job which requires no special skills and which both William Wolf and Daniel Colon would have been qualified to perform.

In early June 1996, assistant steward Lopez was in the foremen's booth at the Mauricetown plant when supervisor Campbell mentioned that he had recently been asked to give Daniel Colon a reference for another job. Lopez took the opportunity to ask if Colon might be recalled as a yard laborer, and Campbell responded by asking who would be the next employee eligible for recall. When Lopez indicated it would be former shop steward and Union activist, William Wolf. Campbell said he did not think anybody was coming back. Lopez suggested Wolf was the "logjam" and Campbell "just grinned", "sort of turned a little red" and said it was a shame that Colon was "getting caught in the middle of all this."

III. Discussion

The issues in this proceeding arose after employees responded to unsuccessful wage negotiations by engaging in a brief strike and then ended the strike by making an unconditional offer to return to work shortly after 8 a.m. on Tuesday January 23 just as the Respondent began at 8:30 a.m. to process the employment of 11 replacement workers and prior to the actual paperwork filing out and processing and drug test and before they started and job training or production work at noon that same day. The Respondent then recalled only 10 of approximately 35 active unit employees and continued to operate with fewer total employees than were utilized prior to the strike. It also is alleged that the Respondent stated that certain employees were not being recalled because of their Union activities.

The Complaint also alleges that Jody Farabella is a Company supervisor or agent and that he violated Section 8(a)(1) by telling employees they would receive a larger wage increase without Union representation. Farabella was initially employed in 1993 as a yard laborer at the Mauricetown plant. He was a Union member after his 90 day probationary period (but never attended any union meetings) and until he became a staff employee as a lab technician for the

Respondent's Port Elizabeth division and health and safety coordinator for New Jersey operators in September 1995. As safety coordinator, he visits all of the Company's New Jersey facilities, including the Mauricetown plant, to conduct inspections and solicit safety complaints from employees. He was trained by and works under the direction of Craig Atkinson, the Respondent's manager of safety and health services, with duties encompassing all of the Respondent's plants and other human resources related duties. Farabella's basic training in performing safety inspections and writing report took 4 to 5 month of formal training. His duties allow him to report safety violation, however, the plant managers have sole responsibility for discipline and otherwise Farabella has no supervisory authority over any other employees. The majority of Farabella's time is spent as a lab technician at the Upper Township facility, however at the time of the strike he spent about a month helping out at the Morristown plant and training the replacement workers, who he said were still in the process of learning when he left. He also testified that the new ingelott machine operators varied in their abilities to learn about that after four weeks they were good and safe but generally not as fast as experienced operators.

Three Mauricetown plant employees, John Burke, Mark Wilson and Thomas Yerkes, testified to an encounter with Farabella which took place in January shortly before the start of the strike. Burke and Wilson were in a bulkloader control room at the Mauricetown plant when this encounter started with Farabella entering the room. Yerkes came in shortly after Farabella. These three employees testified that Farabella began the exchange by asking if there were any health or safety problems and then expressing his desire to handle such problems in a way which would avoid the imposition of discipline on employees. The discussion then turned to the subject of the wage reopener negotiations and when the employees noted they were hoping for a raise, Farabella allegedly replied that his conversations with Company President Cook indicated employees would receive a larger raise if they abandoned the Union. The employees responded by making it clear they were unwilling to give up Union representation and Farabella allegedly said he knew employees would feel that way and the discussion ended.

Farabella denied either telling any employees that they would make more money without Union representation or discussing that issue with Company President Cook.

Here, I find that Farabella's duties were not such that he exercised independent judgment and performed the functions as a statutory supervisor,[3] I also find that the record is insufficient to show that he had a confidential relationship with Cook such that the other employees could reasonably believe that he spoke for management. In this connection, it is noted that they knew Farabella as a former yard worker and it is clear that he did not suddenly assume the position once held by manager Atkinson but became primarily a non-unit lab technician with some additional ministerial duties as health and safety coordinator under the direction and control of manager Atkinson. There is no showing that at the time the alleged comment that Farabella had any apparent authority to speak for management other than as a conduit for health and safety matters. Although I find that credible evidence that Farabella made some "bragging" type of a remark to possibly impress former coworkers with his contacts with the company president, the employee's had no likely or reasonable belief that his remarks

[3] Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

were other than merely his personal opinion. Also, there is no indication that any actual supervisor heard and endorsed or heard and failed to repudiate Farabella's alleged comment and therefore the record cannot support any finding that his statement were those of an agent within the meaning of Section 2(13) of the Act or that they otherwise should be found attributable to the Respondent. Accordingly, I find that this allegation is not proven and must be dismissed.

Otherwise, however, I find that Campbell was a supervisor who's words and actions are attributable to the Respondent and my observations of Lopez's testimony and the absence of any contradictory testimony (Campbell was not called as a witness), leads me to conclude that Lopez gave a trustworthy and credible account of a conversation with Campbell in which Campbell told shop steward Lopez that he didn't think anyone else would be recalled. This conversation included an inquiry about whether employee Colon could be called back, Lopez said Bill Wolf (the union activist) was next (in seniority) and Campbell replied that he didn't think anybody is coming back. When Lopez said "well, I guess Bill Wolf is the log jam" Campbell made no direct reply but grinned, turned red in the face, and said it was a shame Colon was caught in the middle.

Under these circumstances, I agree with the General Counsel's contentions that Campbell's reactions and comments imply that Respondent would not reinstate additional strikers because it wished to avoid reemployment of Union activist Wolf. I conclude that such comments are unlawful, see *Harper Packing Co.*, 310 NLRB 468, 469 (1993), and I find that the Respondent has violated Section 8(a)(1) of the Act in this respect, as alleged.

Returning to the principal issue involved, it is well established by the Supreme Court in *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967), and the Board in *Laidlaw Corp.*, 171 NLRB 1366 (1968), that economic strikers had continued status as employees and entitlement, upon request, to be returned to their former job, or a substantially equivalent position absent proof of "legitimate and substantial business justifications" for an employer's refusal to reinstate the strikers. The employer bears the burden of establishing that justification. *Teledyne Indus., Inc. v. NLRB,* 938 F.2d 627, 629 (6th Cir. 1991). Absent such a showing, an employer's refusal to reinstate strikers constitutes an unfair labor practice because it discourages employees from exercising their rights to organize and strike as guaranteed by the Act. *Fleetwood Trailer* at 378. Otherwise, however, an employer is free to hire permanent replacements to continue operations during a strike and may lawfully refuse to reinstate strikers where it can shown that their jobs are occupied by permanent replacements. An employer also may eliminate strikers' jobs for bona fide reasons unrelated to labor relations such as the need to adapt to changes in business conditions or to improve efficiency.

Here, I find that the General Counsel has established a prima facie violation of the Act inasmuch as the record shows that employees went on strike, unambiguously and unconditionally offered to return to work at approximately 8 am January 23 and were denied immediate reinstatement while the employer proceeded to implement and process the employment of 12 allegedly permanent replacement, completing the process (including the taking of drug test), between 10 am and 12 noon, when 11 of the 12 new hires reported to work. Under these circumstances, I find that the General Counsel has established a prima facie violation of the Act.

I find that at the time the Union made it unconditional offer the Respondent had implemented the hiring of one permanent replacement worker, William Porter who was on layoff at Respondent's Port Elizabeth facility and, in effect, transferred back to the Morristown facility, where he previously had worked, on the morning of January 22.

Otherwise, the record shows that the Respondent operated with supervisory and non unit employees over the weekend after the strike began and on Monday, January 22, when it began the process of recruiting permanent replacement workers. This was done on the phone by plant manager Giaccio with no face to face interviews but with a basic reliance upon references or recommendations by other company employees. Giaccio selected 12 applicants between 2 p.m. and 11 p.m. that Monday.

Giaccio testified that he informed each of the applicant about the strike and told them that they were hired as replacements for the strikers. He also testified that he interviewed each applicant while holding a "Checklist" setting forth key conditions of the replacements' employment and that he read and explained every Checklist entry to each of the replacements. The check list included a statement that said that "I understand my employment will cease if so ordered by the NLRB or court order." Giaccio said he explained to them what that meant: that they were permanent replacements, that the only way that they could lose their jobs is if a court ordered so and that he would not bargain away their jobs at the table.

The applicants were told to report to the Millville headquarters on the Tuesday morning January 23. As noted, they then filled out the standard, formal paperwork required of all new hires, including an employment application and the previously mentioned Conditions of Employment. Manager Atkinson handled this process and repeated an explanation of the Checklist -- assertedly saying that the replacements were permanent -- to each man. The applications which the new hires signed contained specific language advising them that they were employees "atwill" and were probationary employees for 90 days, but contained no language stating that they were "permanent" employees or replacements.

As pointed out by the Respondent, job vacancies created by striking employees may be considered filled by permanent replacements as of the time the replacement accepts the employer's offer of permanent employment, even where a striker may request reinstatement or a strike ends prior to the replacement actually beginning work or coming onto the payroll, see *Solar Turbines, Inc.*, 302 NLRB 14. Although it would appear that a test related to the actual beginning of work would be an unambiguous measure of the effective time when permanent replacement occurred, the policy reiterated in *Solar Turbines* allows an employer to pursue a plan to hire replacements and to assert the creation of a commitment based on equivocal circumstances, such as here, when the alleged commitment occurs at the eleventh hour, with the application, interview and commitment all taking place on the phone, and with no opportunity to complete regular pre hire procedures.

Because Permanent replacement is an affirmative defense, the burden is on the employer to produce specific evidence showing it had a mutual understanding and commitment with the replacements concerning the permanent nature of their employment, see *Augusta Bakery Corp.*, 298 NLRB 58, 66-67 (1990), and the intent to offer permanent employment must be communicated to the replacements. It is not enough that the employer believed the replacements to be permanent or communicated its intentions to the Union or other third parties, see *Associated Grocers,* 253 NLRB 31 (1980). To justify a refusal to reinstate strikers, the employer must show that it had a mutual understanding with the replacement employees and that they were given unequivocal assurances their employment would be permanent, see *Gibson Greetings,* 310 NLRB 1286 (1993) at 1290; and *O.E. Butterfield, Inc.,* 319 NLRB 1004, 1006 (1995).

Supervisor Atkinston testified that in the early afternoon of January 22 Giaccio called and told him they were "hiring replacement workers" that "would be full-time employees and he said that that evening Giaccio again called and said "he had hired 13 full-time replacement workers" who would arrive at the Millville office for processing the next morning. The next morning he found a group waiting in the reception area and between 8:10 a.m. and 8:15 a.m. he received a fax of their names from Giaccio and they all went to a conference room to begin filling out applications and other paperwork.

All thirteen of the replacement employees appeared as witnesses. Nine of the replacements were called to the witness stand by General Counsel at the start of the hearing and the remainder appeared as witnesses for Respondent. As part of the investigation, these same employees also appeared and gave sworn depositions before a field attorney for the Board on April 19, 1996. The transcript of their depositions was received into evidence in this proceeding and it will be utilized in evaluating the credibility of their testimony and is determining what should be accepted as evidence of what most likely was actually said at the time of hire.

In his testimony on April 19, replacement Thomas Streable said that he was contacted by the Regional Office in late March 1996, and by telephone told the Board agent that Giaccio had met with the replacements on January 23 and stated that a lot was pending and the Company could not be sure if the replacements' jobs would be permanent. Streable admitted discussing his telephone call with at least some of the other replacements and that he then testified on April 19 that Giaccio said in a January 22 telephone conversation that Straddle's job was permanent unless a Court ordered the strikers reinstated.

Replacement Brian LaBonne is engaged to the daughter of assistant plant manager Nick Carpelli and in mid afternoon on January 22, he was at the Carpelli residence when his future father-in-law suggested he contact plant manager Giaccio about a job. In a telephone conversation later that evening, Giaccio asked a series of questions and conditions and offered LaBonne employment if he agreed, saying that the job would be permanent unless LaBonne quit or was fired, but did not mention that they were being hired as strike replacements. Giaccio testified Carpelli was at the plant on the afternoon of January 22 helping locate replacements but Carpelli did not testify and it is not clear at what times he could have been at the separate locations.

Replacement Allen Lorenzo Jr. testified to a January 22 telephone conversation with Giaccio and said he, rather than Giaccio, raised the subject of whether the job would be for only 3 or 4 days and that Giaccio replied that the Company did not know how long the job would last; that it might be a three or four day thing or it might be permanent; and that it would probably be permanent if everything worked out all right. Lorenzo did not recall Giaccio mentioned a Court Order. He asked for and was told he would be a "bulk loader" (at $13.19 an hour) and accepted the job. At a meeting held on the following day, he recalled Giaccio saying that the strikers "probably" would not get their jobs back and that Giaccio "hoped" the replacements would be permanent.

Replacements Robert Henry, Frank Reeves, Charles Lewis and Samuel Yearicks all spoke with Giaccio by telephone on January 22 and testified in on April 19 that Giaccio said nothing about whether the job would be permanent or temporary. William Pettit testified that Giaccio said that he "didn't know what's going to go on."

After the deposition testimony was taken and after each replacement had an opportunity to speak privately with an attorney for the Respondent, each replacement was asked again at the hearing in November 1996, what he was told by the Company and what his own belief was with respect to whether the position was permanent or not. In many cases, this testimony was different from and inconsistent with the replacements' responses to identical questions at their depositions a few months earlier. My observation and evaluation of the testimony also leads me to conclude that replacement employees gave answers that conflicted with testimony they had given during their deposition and gave responses to questions asked on cross examination which conflicted with those given to the identical question asked minutes earlier on direct examination.

At the hearing the replacements testified substantially as follows:

Jason Canup initially stated that Giaccio told him "there were full-time jobs." After being shown his earlier testimony, however, he conceded that he was told by Giaccio that he could be laid off or the jobs could be permanent. He also admitted that after he got off the phone with Giaccio on January 22, he did not know if he hard a permanent or temporary job.

Robert Henry testified that he could not remember the specifics of his conversation with Giaccio on January 22, but that he told the Board Agent on April 19 that Giaccio told him that the job was permanent. When shown a copy of the transcript from his deposition which stated otherwise, he could not offer a reason for the discrepancy. When asked whether he was told by Company officials whether the job was temporary or permanent, Henry responded: "I really don't think nobody knew what was going on at the time." He also said that on January 23, Company officials stated they did not know if the job was temporary or permanent. When asked why his testimony at the hearing varied from his prior deposition, Mr. Henry explained that when he originally spoke to the Board Agent, he "didn't know all these questions were going to be asked."

Charles Lewis testified that Giaccio told him on the phone that the job for which he was being hired was permanent. After reviewing the transcript from his deposition, Lewis admitted that he said at his deposition that Giaccio didn't say whether he work was temporary or permanent. He further stated that even at the hearing, he did not remember what Giaccio said about permanency. At the hearing, Lewis also stated he could not remember whether he was told by anyone in management whether the job would be temporary or permanent. Lewis was unable to explain why he testified differently at the hearing than he had previously at the deposition. At the hearing, Lewis testified that Giaccio told him that he could lose his job because of a Board or court order, stated that he inexplicably forgot that during his earlier deposition but conceded that he did not understand what it meant.

Allen Lorenzo, Jr. testified that he remembered Giaccio telling him that the position would be "full-time." After being shown a transcript of his prior deposition testimony, however, he admitted that Giaccio did tell him that it could be a 3 or 4 day thing or it could be permanent. On direct, he had little recollection of his conversation with Giaccio but admitted that after he got off the phone with Giaccio, he "didn't think [the job] would be permanent." Rather, he believed that the strikers would return to work and he would lose his job.

William Pettit testified that he was told by Giaccio during their January 22 phone conversation that the job was permanent. When confronted with his prior deposition testimony in which he stated that Giaccio "didn't know what was going to go on" and that he should "just play things by ear," Pettit denied that Giaccio ever made these remarks. He explained that he did not know why he said what he did at the deposition, that when he spoke then he was confused, and be began to remember things after his deposition.

Frank Reeves testified at the hearing that Giaccio told him that job would be permanent. When confronted with his prior deposition testimony in which he stated that Giaccio never said if the job was to be permanent or not, Reeves commented only that the questions at the deposition were coming at him so fast that he did not understand them. He admitted, however, that, after speaking with Giaccio on January 22, he himself "didn't think it would be permanent" and that after the strike was over, he would lose his job.

Thomas Streable stated that he was told by Giaccio that the position was permanent unless there was a court order stating otherwise. On cross-examination, he reaffirmed statements he made at his prior deposition that after he got off the phone with Giaccio, he had some doubts as to whether the job was permanent. Subsequently, he reiterates that he previously told the Board agents that there was substantial uncertainty as to the permanency of these positions and he was uncertain as late as the date of his deposition.

David Yearicks testified that although Bob Cook, Morie's President, told him that the job was temporary, Giaccio told him on the phone that it was permanent. When asked why he said something different at his deposition, Yearicks replied that during his earlier testimony, he "made a mistake". Yearicks repeated at the hearing that it was Bob Cook, the Company President, not plant manager Giaccio, who said that the job was temporary, and that "if the strike went (sic) over and [the Union] got their contract back, that we would all be laid off." Despite his changed testimony, Yearicks admitted he believed that the job was temporary. "I thought, from what everybody was telling me, like what Bob Cook said, that I thought myself, that it would be temporary."

Sam Yearicks testified that Giaccio told him on the phone that his job would be "full-time". When asked why he did not say this at the deposition, he stated that he simply forgot. Although Yearicks admits that twice during his deposition he testified that Giaccio never indicated whether the job was temporary or permanent, he now claims he forgot. Yearicks finally states that Giaccio told him that the job was full time, and had no recollection that he indicated it would be permanent.

Porter was a permanent employee on layoff status and he testified that he was asked by his plant manager at Port Elizabeth if he wanted to "come back to work" he said "yes", and was told he would be going over to Morristown rather than the Port Elizabeth facility and he reported to work there at 6 a.m. on January 22. He also said he assumed his job was permanent because he was working for the company already and was called back from layoff.

Replacements Streable, Labonne, and D'Ambrosio were called as witnesses by the Respondent on Friday November 15, the third day of the hearing. On cross-examination, Streable admitted that on Thursday prior to his testimony on Friday that he and D'Ambrosio engaged in some discussions about the type of questions with replacement witnesses Lewis, Lorenzo and "maybe" Fullerton and Porter. Labonne was thereafter called and was asked whether he had heard or engaged in any discussion at work concerning the questions asked at the hearing. He answered "not really," then said he spoke with Lewis and "may have" spoken with Lorenzo, that he "may have" been with a group including Streable but said he "don't really know" or don't recall if the type of questions people under subpoena were being asked in the hearing.

The testimony by the replacements called on November 15 occurred in direct violation of my outstanding sequestration order which was a direct reading into the record of the Board's appropriate language set forth in *Greyhound Lines*, 319 NLRB 554 (1995). As noted in the Board's decision in *El Mundo Corp.*, 301 NLRB 351, at 358 (1991), "the purpose of sequestration is to preclude communication among witnesses in order to enhance the probability that they will tell their own recollection of events, uninfluenced by the contemporaneous accounts by other persons" and, as further noted in that decision, the credibility of such tainted testimony should be scrutinized to evaluate its reliability.

Here, I find that the testimony of the last called replacement workers, as it relates to the matter of corroboration of manager Giaccio's alleged statements about "permanent" replacements, are inherently untrustworthy. Also, the breach of the sequestration order by those replacement who testified after being called by the General Counsel and then spoke with other potential witnesses about the questions they were asked, also call into play their own reliability on matters of truthfulness and reflects adversely upon their own credibility on this subject.

In addition to the sequestration matters, I also have evaluated the demeanor of these witnesses and the probability of collusion between them and the overall believability of their sometimes conflicting and inconsistent testimony both at the hearing and at their prior sworn deposition on April 19. Under these circumstances, I find that their initial statements, both at their deposition and under direct examination by the General Counsel (or the Charging Party), should be found to be the most likely and trustworthy account of their January 22 phone interviews with manager Giaccio. I conclude that, for the most part, the credible testimony does not corroborate Giaccio's testimony that he consistently conveyed to each and every replacement that they were to be permanent replacements.

As noted by the General Counsel, it is significant that assistant plant manager Nick Carpelli was said to be present with Giaccio when the plant manager promised the replacements permanent work, and it appeared at one point in the hearing that the Respondent intended to use Carpelli as a witness. But one witness testified that Carpelli was at another location on that date and Carpelli was never called to testify and no explanation for his non-appearance was given. I therefore find that the Respondent's failure to present this witness (a witness within the partie's control), warrants an inference that he would not have provided testimony favorable to its position. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

As noted above, it is the Respondent's burden to show that there was a mutual understanding that the strike replacement were hired on a permanent basis, see also *Augusta*

Baking Corp., 298 NLRB 58 (1990) and *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995) at 1006 where the Board recognized that:

> it is particularly important for an employer to establish permanency of employment during a strike, because that is a time of uncertainty for all employees, strikers and replacements alike. It is therefore incumbent on the employer, which has control over the employees' status, to communicate clearly with employees as to whether they have been hired on a permanent or a temporary basis.

Here, the Respondent's showing rest almost entirely on Giaccio's claim that he told each new hire that "we were hiring permanent replacements". These claims are not supported by credible evidence from other sources, they are not supported by circumstantially evidence and they tend to be refuted by the sometimes conflicting but otherwise more likely and believable testimony of most of the replacements to the effect that they did not believe that they were "permanent" replacement but, at best, were unsure what to expect and believed they had a "full time" job that could end for any reason including the ending of strike by the employees but, otherwise, "nobody knew what was going on at the time."

If the Respondent's action and intent in its telephone hiring on January 22 was to hire permanent replacements, then it easily could, and should, have affirmed that in writing when the hiring was implemented in the processing that occurred on January 23 (after the strikers had conveyed their unconditional offer to return). Instead, the Respondent specifically avoided any such written confirmation of such an intent and made each applicant sign a confirmation that he was an "at will" employee who could be terminated "at any time with or without cause and without prior notice." Thus, the Respondent's documented hiring implementation fails to corroborate any intent or practice to offer jobs as permanent replacements and, in fact, is inconsistent with any commitment on its part to mark the replacements as permanent.

As noted, the strike occurred over failed negotiation relative to a wage reopener provision and, otherwise, the unit employees were not "at will" employees, but were employees subject to the existing bargaining agreement between the Company and the Union and the Contract, including wages, clearly was effective when the Union accepted the Companys' final offer and offered to return to work. Accordingly, it also would appear that any truly "permanent" replacements for some of the former strikers could not be purely "at will" employee but would have been subject to the various tenure provisions of the bargaining agreement, including seniority, discharge, and grievance procedures.

Here, the Respondent's plant manager spent an afternoon and evening (2 p.m. until 11 p.m.) speaking on the phone with 60 job seekers in which he conducted telephonic interviews, using a check list, and also made some calls to check references. He hired a dozen new employees who generally were referred by some company employee but who otherwise lacked sand plant or related experience and some lacked required drivers licenses. This procedure was in sharp contrast to its usual hiring procedures which involves the preliminary filing of an application, face to face interviews, a checking of references and experience or ability and then medical and drug test. Moreover, as pointed out by the General Counsel, the Respondent did not know the strikers would offer to return on the following morning and the credible initial testimony of the replacements that they were unsure or thought their status would be temporary is more credible than the Respondent's claim that it hired them, face and application unseen, to be permanent replacements. Excluding Porter, 10 of the 12 replacements initially did not assert that they were promised permanent employment and, under these circumstances, I therefore

conclude that the Respondent has not met its affirmative defense and that the record does not persuasively show that the replacement workers, except Porter, understood themselves to be or were thus in fact, hired to be permanent replacement worker and, accordingly, the Respondent's failure to afford timely reinstatement to all regular employees, except those few recalled on January 29, violates the striking employees' rights to reemployment and I find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate strikers after their unconditional offer to return on January 23, as alleged.

When the strike ended the Respondent was operating with Porter, supervisors, and non-unit personal until the afternoon of January 23 when 11 replacement hires began work (and one latter began on the night shift). A week after the strikers sought to return, the Respondent recalled 10 unit employees on January 29 (Eleven were recalled if Angel Bernandez is included but he was on disability on the 29th and was not cleared to return until January 31), and Stephen Garrison was recalled effective February 1, however only the latter two, and those recalled latter or not at all, are alleged to be untimely.

On January 20 when the strike began, there were 35 actively unit employees during what is historically the plant's slow season. Manager Giaccio testified that 35 or 36 replacements would have been needed to give the plant a full complement of workers. Yet, when strikers first returned on January 29, only 23 employees made up the total force and the General Counsel contends that 13 or 14 positions were unfilled and should have been available to the strikers in addition to the 12 replacements (not counting Porter), who should have had their job taken by the strikers.

It is clear that an employer has an obligation to reinstate strikers to any positions left open when the strike concluded and to any positions which subsequently became available provided they were qualified for the jobs and to the extent strikers were left unreinstated, the burden is on the employer to demonstrate that no positions were available for them to fill see *Fleetwood Trailer,* supra, at 379. The fact that the Company did not use replacements to fill some of the strikers' job is not a sufficient defense and an affirmative business related explanation for the reduction in the size the Company's post-strike work force must be shown. See, *Transport Services Co.*, 302 NLRB 22, 29 (1991).

Although production never stopped and the strikers were available after less than a week, the Respondent asserts that its operations changed and that the strikers positions were no longer available. This purported change is said to be based upon the fact that the Mauricetown facility's entire mining operation ceased at the end of 1994, as well as the company's assertion that throughout 1995 and into 1996, the plant struggled with the implications of this development and whether the facility could operate profitably without mining. Giaccio also said he calculated that the plant could achieve a significant savings by working the replacements (who got no fringe benefits), with some strikers as they were called back on an overtime basis during the facility's busy season rather than "staffing up" with a greater number of employees working shorter hours.

The Respondent points out that Giaccio's testimony indicates that he had always preferred to run the plant with overtime during the busy season and he alleges that he had been stymied in this effort to achieve cost savings (no actual cost data was placed on the record), by the unit employees reluctance to do so. (Although not an allegation in this proceeding, it would appear that this is a subject for resolution thought the bargaining process rather that unilateral action by an employer). Giaccio testified production did not drop off during the strike and, accordingly, the Respondent can not claim the reduction in the size of its post-strike work force was due to the impact of the work stoppage. Also, post strike production was generally

equivalent to production in the same time frame in the preceding year and thus it was not a post strike reduction in work load which caused it to reduce the employee complement.

Here, it appears that the Respondent's actions in reducing staffing occurred because of the strike and not merely because of its desire to change its operations. The company did not attempt to negotiate change though the bargaining process but instead took an aggressive stance on wages during wage reopening negotiations. Moreover, a productivity program was opposed by then Union steward William Wolf during the 1993 negotiation and he was thereafter terminated but reinstated through the contract grievance-arbitration procedure.

I credit the testimony that after this reinstatement occurred supervisor Robert Fullerton stated that Wolf did not belong in the plant and was only present because of the Union. I also credit the testimony that in the aftermath of the strike Giaccio stated that he hoped the strikers would not get their jobs back and that he intended to do all he could to avoid their return. Also, after the strike concluded, supervisor Campbell implied that the Company's failure to recall additional strikers was prompted by a desire to avoid reemployment of Union activist Wolf. Accordingly, I find that there is significant evidence of animus toward Union employees and their activity which evidence support an inference that this animus was a motivating factor in the Respondent's contemporaneous conduct relative to the delays in recalling strikers, its reduction in normal staffing levels and its use of increased overtime (which negated the reemployment of additional strikers), following the end of the employees' brief strike. This showing is consistent with the criteria set forth in *Wright Line, A Division of Wright Line Inc.,* 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 103 S. Ct. 2469 (1983) and, accordingly, the record also will be evaluated to consider Respondent's defense and whether its asserted legitimate business relative to *Fleetwood Trailer, supra,* persuasively show that it would have taken these same actions even in the absences of the Union strike over the wage reopener negotiations.

Here, there is no explanation for the sudden change from a full complement of 35 unit employees prior to the strike to 23 thereafter, except for the elimination of two truck driver positions and the bland assertion that it was a phased reinstatement for production needs and that the company was "feeling it way" regarding the number of drivers needed after it stopped mining and started to stockpile sand reserves.

Four laid off employees were recalled to work on January 8, two weeks before strike began however, no apparent consideration of increased overtime as an alternative to additional employees was considered at this opportune time. The strike and the overnight hiring of some replacement workers was the one intervening event and I infer that the real reason for the sudden reduction in staffing and use of extensive overtime was to minimize and avoid the recall of strikers.

This conclusion is reinforced by the Company's decision to process the hiring of the replacement employees, with the cost and effort to train these new employees, even though the strikers had offered to return several hours before these replacements could begin work and the plant could have been operated at the same time using their skilled services without any need for replacements who required extensive training.

Turning to a more specific review of the positions involved, the record supports the General Counsel's analysis and his contentions that the Respondent has failed to affirmatively show justifications for the delay's and failures in recalling former strikers.

Six maintenance workers were employed when the strike began. Five of these six employees were recalled to work immediately following the work stoppage. The sixth, Glen Homan, was not recalled until March 25. None of the replacements was assigned to work in maintenance, but the Respondent makes no explanation for its failure to return Homan to work immediately following the conclusion of the strike.

Francis Gilman was employed as the plant dozer operator when the strike began and he operated bulldozers, street sweepers and other machines at both Mauricetown and other Company facilities. He was not recalled to work until February 19, and the Respondent offered no explanation for its delay.

In late July 1996, Gilman stopped work due to a disability. This created an opening in the Mauricetown workforce which Respondent was required to offer to any qualified unreinstated striker. Unreinstated striker Thomas Yerkes had been trained and was qualified to perform Gilman's and should have been recalled to fill the Gilman vacancy but the Respondent did not do so and did not offer a business justification for its failure and for its apparent use of non-unit employees from other Company plants to come in and operate Gilman's equipment.

Three yard laborers were employed when the strike began and no replacements were hired. None was reinstated immediately upon the work stoppage's conclusion. Two, Santos Marquez and Eddie Ramirez, were recalled on February 8. The third Thomas Pluta, returned to work on April 1. No business justification for its failure to bring them back to work following the strike's conclusion was offered by the Respondent. Three additional laborers were on lay off when the strike began and they did not participated in the work stoppage. Elvis Colon and Robert Clemens were recalled to work on April 1. The return to work of these employees demonstrates that two laborers positions were available as of April 1 and such openings should have been offered to qualified strikers before they were filled with laid off employees, see *Wisconsin Packing Co.*, 231 NLRB 546 (1977), as the laborers' job requires no particular skills and could have been filled by any of the strikers who remained unreinstated as of April 1, including some of the unreinstated strikers who had served as laborers previously.

Four bulkloaders were employed when the strike began but four replacements were retained as bulkloaders when the work stoppage ended. Bulkloader work typically increases during the Company's busy spring and summer seasons. In 1995, the increased work load caused the Company to add a fifth bulkloader. In 1996 the number of bulkloaders was not increased during the season. Instead, the Company increased the number of hours worked by the existing bulkloaders. For example, the work schedules for the period after April 7, shows that four bulkloaders (Lorenzo, Lewis, Streahle and D'Ambrosio) were regularly assigned to work 12-hour shifts.

The schedules and the summary of hours worked indicate that sufficient work was available (approximately 200 hours a week for four workers), in the April-June period of 1996 to justify the employment of at least one additional bulkloader and the Respondent's only justification asserted was that the use of overtime was more cost effective.

Eight Inglett operators were employed when the strike started but seven were employed in the classification as of January 29, when the first group of strikers returned with six replacement workers returning striker Luis Lopez. Inglett operator Stephen Garrison was recalled to fill the open position on February 1 after shop steward Lopez' complaint about the use of supervisors to perform unit work, Respondent offered no explanation for the delay in recalling Garrison.

Inglett operators James Gale and John Ackley were recalled on February 8 and it is shown that Inglett operators worked significant amounts of overtime in February, (In February the ten Inglett operators worked an average of 483 hours per payroll work, or roughly 48 hours per employee per week). Thus, two additional Inglett operator positions apparently were available immediately following the strike, and Respondent failed to show why Gale and Ackley were not recalled to these positions before February 8.

Work in the Inglett operator classification increases during the Company's busy season. In 1995, Respondent employed 12 Inglett operators for most of the spring and summer months. The Company avoided increasing its employee complement in 1986 by having Inglett operators work significant amount of overtime and work schedules show many of the Inglett operators were routinely assigned 12-hour shifts starting in April. The hours worked by the employees in the Inglett operator classification were sufficient to justify the employment of at least two additional operators for much of April through July busy season (Assuming a 40 hour work week, 12 Inglett operators would have worked 480 hours in a normal payroll week. Records shows that the 10 operators actually employed by Respondent worked an average of 559 hours per week in April 1996, 472 hours per week in May 1996, 512 hours per week in June 1996 and 460 hours per week in July 1996).

Five truckdrivers were employed at the start of the strike. A sixth driver, Angel Bermudez, was on disability. Bermudez returned from disability on February 1, but none of the other drivers was returned to work until March 19, when Jose Jimenez was recalled. Jimenez became a heavy equipment operator to fill a position created by the death of Charles Carver, and strikers Don Corbin and Raymond Porter were recalled to work as truckdrivers. The two remaining striking drivers, Joseph Wolf and John Sheppard, were never returned to work.

None of the replacements was assigned to work as a truckdriver. Although the Respondent gave some justification for the limited recall of truck drivers. Driver Corbin testified that the regular stockpiles were largely absent when he was recalled to work in early May, indicating that some of the truckdriver work had gone unperformed.

Corbin and employee Lopez also testified that following the strike, storekeeper Wilfredo Gomez and other employees classified in positions other than truckdriver routinely performed truckdriver duties, typically done on overtime after the employees completed their normal duties (Company payroll records show a marked increase in overtime hours worked post-strike), a practice that was not followed on a regular basis before the strike.

The General Counsel pointed out that the end of mining operations occurred over a year prior to Giaccio's post-strike decision to increase overtime hours and, because of the lapse of time between the two events, as well as the speculative nature of the Respondent's cost savings claims, I find that the record fails to persuasively show that the Respondent had a real and independent business justification for its staff reduction and its failure to recall strikers. Here, the plant manager gave only a general explanation for his conclusion that added overtime was cost effective and the Company's failure to produce substantiating data within its control suggests the data would not have supported Giaccio's contentions. The Respondent's proof consisted of little more than Giaccio's assertion that overtime was less expensive, and this, standing alone, does not satisfy the Company's obligation to establish a substantial business justification for its conduct. Accordingly, I find that the Respondent failure to immediately recall the truckdrivers and other strikers to fill the positions should have been available on and after January 29 was unlawful and I find that Respondent violated Section 8(a)(1) and (3) in this respect, as alleged.

IV. Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organization within the meaning of Section 2(5) of the Act.

3. By implying that additional strikers would not be recalled because the employer did not want to recall a Union activist who was next in seniority, the Respondent has interfered with, restrained and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

4. The replacement employees verbally hired on January 22, 1996 were not permanent replacements, except for prior employee William Porter who started work on that day.

5. By failing, refusing and delaying the recall of strikers on and after January 29, 1996, the Respondent has violated Section 8(a)(3) and (1) of the Act.

6. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

V. Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to immediately reinstate all employees who participated in the strike that began January 20, 1996, and ended with the employees unconditional request for reinstatement on January 23, 1996 to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all employees hired to replace them. If, after such dismissals, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice utilized by the Respondent. The remaining former strikers for whom no employment is immediately available, shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired.

It also is recommended that the Respondent be ordered to make whole those former strikers for any loss of earnings they may have suffered by reason of the Respondent's refusal to reinstate them on January 29, 1996, in accordance with their unconditional requests to be reinstated. Backpay shall be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[4] Otherwise, it is not considered necessary that a broad Order be issued.

[4] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[5]

ORDER

Respondent, the Morie Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by implying that additional strikers would not be recalled because the employer did not want to recall a union activist who was next in seniority.

(b) Failing, refusing and delaying to reinstate striking employees after they made an unconditional offer to return to work.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Within 14 days from the date of this Order, offer Stephen Garrison, James, Gale III, John Ackely, Eddie Ramirez, Santos Marquez, Francis Gilman, Jose Jimenez, Glen Homan, Thomas Pluta, Elvis Colon, Robert Clemens, Donald Corbin, Raymond Porter, Daniel Colon, Keith Stiles, Thomas Yerkes, William Wolf, John Burke, Pablo Lopez, Timothy Willis, Mark Wilson, Clarence Welden, III, Joseph Wolf, Jr., John Sheppard, John Franckle and Brian Homan immediate and full reinstatement and make them whole for all losses they incurred as a result of the discrimination against them, in the manner specified in the section entitled "The Remedy."

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days of service by the Region, post at its Mauricetown and Millville, New Jersey facilities and all current facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 16, 1997.

Richard H. Beddow, Jr.
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by failing, refusing and delaying to reinstate striking employees after an unconditional offer to return to work.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by implying that additional strikers would not be recalled because the employer did not want to recall a union activist who was next in seniority.

WE WILL NOT in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Stephen Garrison, James, Gale III, John Ackely, Eddie Ramirez, Santos Marquez, Francis Gilman, Jose Jimenez, Glen Homan, Thomas Pluta, Elvis Colon, Robert Clemens, Donald Corbin, Raymond Porter, Daniel Colon, Keith Stiles, Thomas Yerkes, William Wolf, John Burke, Pablo Lopez, Timothy Willis, Mark Wilson, Clarence Welden, III, Joseph

Wolf, Jr., John Sheppard, John Franckle and Brian Homan immediate and full reinstatement and make them whole for all losses they incurred as a result of the discrimination against them, in the manner specified in the Administrative Law Judges Decision under section entitled "The Remedy."

THE MORIE COMPANY, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, Philadelphia, PA, 19106–4404, Telephone 215–597–7643.